



Issue Date: 17 May 2006

BALCA Case No.: 2005-INA-00025
ETA Case No.: P2004-CA-09534160/JB

In the Matter of:

7-ELEVEN STORE,
Employer,

on behalf of

GURMAIL SINGH,
Alien

Certifying Officer: Martin Rios¹
San Francisco, California

Appearance: J. Dhokia, Esquire
Law Offices of Ladva and Associates
Brea, California
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. 7-Eleven Store (Employer) filed an application for labor certification² on behalf of Gurmail Singh on April 4, 2001 (AF 37).³ The Employer seeks to employ

¹ Mr. Rios was the Certifying Officer who denied the application. The Employment and Training Administration subsequently transferred responsibility over applications filed in San Francisco prior to the effective date of the "PERM" regulations to its Dallas Backlog Processing Center.

² Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004).

³ In this decision, AF is an abbreviation for Appeal File.

Alien as a Store Manager (Occ. Code: 41-1011). *Id.* This decision is based on the record upon which the Certifying Officer (CO) denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, the Employer described the duties of the position as:

Retail Trade Manager: Directs and Coordinates activities of the store, negotiates contracts between wholesale and the store, directs through subordinates, supervisory personnel, collection of fees or monies due market; maintenance and cleaning of building and enforcement of market sanitation and security rules and regulations. Keeps records of current sales prices of food items and total sale volume. May endeavor to resolve differences arising between buyers and the store. May prepare market activity reports for the owner. Select and hire new employees. Directs employees training to improve efficiency and ensure conformance with standard procedures and practices.

The Employer required two years of experience in the job offered. The Employer also required two years of experience in convenience store management. (AF 37).

In the Notice of Findings (NOF) issued January 13, 2004, the CO found two deficiencies. First, the CO noted that the regulations at 20 C.F.R. § 656.21(b)(1) through (9) require that the text of the advertisement describe the job opportunity with particularity. The CO found the position was advertised as “Store Manager,” but the job should have been advertised under “Manager (Manager, Convenience Store or Manager, Retail).” The CO stated that the Employer must indicate willingness to readvertise under the correct heading. The CO also stated that failure to indicate willingness to readvertise would result in a denial of the Employer’s application.

The CO also stated that the regulations at 20 C.F.R. § 656.21(b)(5) require the Employer to document that the job requirements as described are the Employer’s actual minimum requirements for the employment. The CO noted that the requirement of two years of experience in convenience store management does not appear to represent the

Employer's true minimum requirements since, at the time the Alien was hired, the Alien had no experience in convenience store management. Rather, the Alien had only general retail management experience. The CO stated that the Employer must either delete the special requirement and retest the labor market, or document why it is not feasible to hire anyone with less than this experience, or document that the Alien obtained the required experience or training elsewhere. (AF 32-35).

The Employer submitted rebuttal on February 10, 2004. (AF 17-31). The Employer amended form ETA 750A in Item 9 to read "Manager" as the job title rather than "Store Manager." The Employer stated that it was willing to retest the labor market with the revised requirements as directed in the NOF, and included a draft advertisement. (AF 22, 24).

The Employer also submitted a letter from a 7-Eleven franchisee regarding the Alien's experience for eighteen months from January, 1997 to July, 1998 as Acting General Manager for a 7-Eleven Food Store in West Covina, California. (AF 26). In addition, the Employer submitted a letter dated January 26, 2004, stating that a new Retail Information System (RIS) was implemented in 1998 in 7-Eleven stores. Since this system was implemented in 1998, the Employer stated that the employees are required to have appropriate education and training to apply their skills in the new system and in the store. Therefore, the Employer stated, it is not now feasible to hire anyone with less than the requirement of two years of experience in a convenience store management. (AF 27-28).

The CO issued a Final Determination denying the Employer's application for labor certification on March 19, 2004. (AF 15-16). The CO found that the Employer's rebuttal failed to rebut the deficiency regarding the failure to designate actual minimum requirements. The CO noted that the Employer submitted documentation in an attempt to show the Alien's prior experience and to establish why it is not feasible to hire anyone possessing less than two years of experience in convenience store management. The CO found, however, that the letter establishing the Alien's experience for eighteen months as

an Acting General Manager established that the Alien did not meet the Employer's two year of experience requirement at the time he was hired. In addition, the CO stated that the Employer provided no evidence that the Retail Information System (RIS) implemented in 1998 in 7-Eleven stores is specific to convenience stores. Therefore, the CO concluded that the Employer had failed to show that two years of training/experience in convenience store management is its true minimum requirement. Based on that finding, the CO denied the application for labor certification. (AF 15-16).

On April 20, 2004, the Employer requested review. (AF 1). Along with its request for review, the Employer submitted a letter amending the special requirements (AF 8), a letter from Neeraj Maini, Field Consultant, noting that the Alien manages a high-volume 7-Eleven store and has demonstrated competence on the RIS computer system which is exclusive to 7-Eleven, Inc., (AF 6-7), and a letter from the Alien's employer in India detailing additional experience. (AF 4-5).

The case was docketed by the Board on November 11, 2004.

DISCUSSION

In this case, the Employer has submitted additional evidence regarding the special requirement of two years of experience in convenience store management, including his willingness to delete the requirement. The regulations, however, preclude consideration of evidence which was not within the record upon which the denial of labor certification was based. 20 C.F.R. §656.26(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989) (*en banc*).

The Employer failed to document that the Alien had the special experience prior to being hired, and the CO properly denied the labor application for labor certification on this basis. *Apartment Management Co.*, 1988-INA-215 (Feb. 2, 1989) (*en banc*). In addition, the Employer failed to document why it is not feasible to hire anyone with less than this requirement. The Employer's mere statement that it is now not feasible to train

workers because of the new RIS system which was implemented in 1998 does not provide the required documentation. *MMATS, Inc.*, 1987-INA-540 (Nov. 24, 1987) (*en banc*). The CO properly denied the application for labor certification since the Employer had not documented that the job requirements as described represented the Employer's actual minimum requirements pursuant to 20 C.F.R. § 656.21(b)(5).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

